Datuk Bandar Dewan Bandaraya Kuala Lumpur v Ong Kok Peng & Anor

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-47-1992
JEMURI SERJAN CJ (BORNEO), MOHAMED AZMI AND PEH SWEE CHIN SCJJ
5 APRIL 1993

***Tort** — Defective premises — Contract of maintenance between owner and third party — Duty and liability of owner — Whether owner could claim indemnity from third party for injury caused to plaintiff*

***Tort** — Independent contractor — Whether employer liable for default and negligence of independent contractor — Whether there was strict liability — Principles applicable*

The plaintiff was badly injured when he fell down the shaft of a lift at the Pekeliling Flats which together with the lifts inside them were owned by the Dewan Bandaraya, Kuala Lumpur of which the defendant was its Datuk Bandar. There was no warning sign of any sort or any guard or barricade put up then at the lift door about the lift being out of order. At the trial, all parties agreed on the damages being fixed at RM30,000 at the outset of trial subject to proof of liability. In respect of the particular lift, it was covered by an agreement for maintenance made between the defendant and the third party for a period during which the accident took place. The lifts, as far as all the parties herein were concerned were under the control and management of and to be maintained by the defendant at the cost of the defendant. The learned trial judge gave judgment for the plaintiff against the defendant but dismissed the claim for indemnity against the third party, holding that the plaintiff was an invitee of the defendant and that the defendant owed a duty of care to him and briefly put, in regard to the third party, the defendant failed to give approval to remedy the defects promptly or early despite the letter from the inspector of machinery pointing out the defects in the lifts.

Held, confirming the judgment in favour of the plaintiff and allowing the defendant's claim against the third party:

(1) The situation faced by the plaintiff was a situation which created such an extra hazardous act or omission involving special danger to such users of that lift that the defendant could not escape such a liability by entrusting it to the third party. Moreover, the maintenance of the lift was also a statutory duty imposed on the defendant by the Factories and Machinery Act 1967. The defendant cannot escape liability by delegating it to the third party, his independent contractor.

(2) The breach of duty of not exposing the plaintiff to and of failure to warn the plaintiff of the concealed danger or trap in the instant case was specifically the failure by the third party and also by the

defendant for not seeing to it that there was no such failure to give any warning signs in respect of the defective lift. Such failure of the third party was in breach of his contractual obligation to erect such warning signs, etc under the maintenance agreement of the lifts made between the defendant and the third party and in addition, the third party had expressly agreed to indemnify the defendant for damages for accidents at common law. The third party was also negligent of failure in giving warning signs, before the date of the accident, from the moment it came to know or ought to have known of the trap or hidden danger created by the defective lift.

[Bahasa Malaysia summary

Plaintif cedera parah apabila beliau jatuh ke dalam lubang lif di Pekeliling Flats yang bersama dengan lif itu dimiliki oleh Dewan Bandaraya, Kuala Lumpur dan defendan adalah Datuk Bandar. Tidak terdapat sebarang tanda amaran atau sebarang adang atau halangan yang diletak di pintu lif untuk menyatakan bahawa lif itu rosak. Di perbicaraan itu, kesemua pihak bersetuju atas jumlah gantirugi yang ditetapkan sebanyak RM30,000 pada permulaan perbicaraan itu, tertakluk kepada bukti liabiliti. Terdapat suatu perjanjian untuk penjagaan lif tersebut yang diikat di antara defendan dan pihak ketiga pada masa kemalangan itu berlaku. Lif itu, bagi semua pihak yang berkenaan berada di bawah kawalan dan pengurusan dan dijaga oleh defendan dengan perbelanjaan defendan. Hakim perbicaraan yang arif telah memberi keputusan memihak kepada pihak plaintif menentang pihak defendan tetapi telah menolak tuntutan tanggung rugi terhadap pihak ketiga, membuat keputusan bahawa plaintif merupakan seorang yang dijemput oleh defendan dan bahawa defendan mempunyai kewajipan berjaga-jaga terhadapnya dan secara ringkas, berkenaan dengan pihak ketiga itu, defendan gagal memberi arahan untuk memperbaiki kerosakan dengan segera atau cepat walaupun surat dari inspektor jentera menunjukkan bahawa terdapat kerosakan di dalam lif itu.

Diputuskan, mengesahkan keputusan memihak kepada plaintif dan membenarkan tuntutan defendan terhadap pihak ketiga:

(1) Situasi yang dialami oleh plaintif merupakan suatu situasi yang mewujudkan perbuatan atau peninggalan yang membahayakan pengguna-pengguna lif dan oleh yang demikian defendan tidak terlepas daripada liabiliti dengan mengamanahkannya kepada pihak ketiga. Lebih-lebih lagi, penjagaan lif itu merupakan suatu tanggungjawab statutori yang dikenakan ke atas defendan oleh Akta Kilang dan Jentera 1967. Defendan tidak boleh melupuskan tanggungjawab beliau itu dengan memberi perwakilan kuasa kepada pihak ketiga.

(2) Perlanggaran kewajipan kerana tidak memberitahu plaintif dan tidak memberi amaran kepada plaintif tentang bahaya atau

perangkap yang tersembunyi di dalam kes ini merupakan kegagalan spesifik pihak ketiga dan juga defendan kerana tidak memastikan bahawa tidak terdapat kegagalan memberi amaran mengenai lif yang rosak itu. Kegagalan pihak ketiga untuk membuat demikian melanggar kewajipan kontrak untuk meletakkan amaran sedemikian, dan sebagainya di bawah perjanjian penjagaan untuk lif itu yang telah diikat di antara defendan dan pihak ketiga dan lebih-lebih lagi, pihak ketiga telah dengan jelas bersetuju akan menanggung rugi sebarang gantirugi di bawah 'common law' yang terpaksa dibayar oleh defendan disebabkan sebarang kemalangan. Pihak ketiga cuai kerana tidak memberi sebarang amaran, sebelum kemalangan itu berlaku, dari masa mereka mengetahui atau sepatutnya mengetahui mengenai bahaya atau perangkap yang tersembunyi disebabkan oleh lif yang rosak itu.]

Cases referred to

1 *Fairman v Perpetual Investment Building Society* [1923] AC 74 (refd)
2 *Latham v R Johnson & Nephew Ltd* [1913] 1 KB 398 (refd)
3 *Bower v Peate* (1876) 1 QBD 321 (refd)
4 *Tarry v Ashton* (1876) 1 QBD 314 (refd)
5 *Wilsons & Clyde Coal Co Ltd v Flynn* [1930] AC 516 (refd)
6 *Rylands v Fletcher* (1868) LR 3 HL 330 (refd)
7 *Salsbury v Woodland & Ors* [1970] 1 QB 324; [1969] 3 All ER 863 (refd)
8 *Honeywill & Stein Ltd v Larkin Brothers Ltd* [1934] 1 KB 191 (refd)

Appeal from: Civil Suit No P77 of 1993 (High Court, Kuala Lumpur)

Peh Swee Chin SCJ (delivering the grounds of judgment of the court): The High Court has earlier at the first instance given judgment against the defendant by allowing the claim of the plaintiff against the defendant and dismissing the defendant's claim against the third party. On appeal to us against the said judgment, we have allowed the appeal of the defendant to the extent that the judgment and costs given by the High Court in favour of the plaintiff be confirmed but that the judgment and costs given by the High Court in favour of the third party be reversed by entering judgment with costs in favour of the defendant against the third party instead. We indicated we would give our reasons in writing and we now hereby do so.

This case concerns one of those lift accidents, which have been on the increase with usually serious injuries to persons involved, brought about by a very notable change of life style caused by shortage of town land, and hefty increase of urban population leading to mushrooming of construction of high-rise blocks of flats and similar structures incorporating lifts for the use of such flat-dwellers.

The facts could be summarized as follows.

At about 6am on 29 April 1980, the plaintiff, a taxi driver wanted to collect some keys from a friend living at Block B, Pekeliling Flats at Jalan

A Pekeliling, Kuala Lumpur, the latter was apparently a tenant at the Pekeliling Flats which together with the lifts inside them were owned by the Dewan Bandaraya, Kuala Lumpur of which the defendant was its Datuk Bandar. The plaintiff wanted to use the lift and pressed the lift button. He tried all the three lifts there on the ground floor but no lift came after about five minutes. He then decided to walk up the staircase and found every lift door B closed on the first, second, third and fourth floors. On reaching the fifth floor, he saw a lift door partly open for about one foot wide. There were lights at the staircase but none at that lift about 12ft away from the staircase and it was bright enough to see the lift door. He opened the lift door and stepped in and fell straight down the shaft, there was no lift inside the door.

C There was no warning sign of any sort or any guard or barricade put up then at the lift door about the lift being out of order.

The plaintiff was badly injured and at the trial all parties agreed on the damages being fixed at RM30,000 at the outset of trial subject to proof of liability.

In respect of the particular lift, it was covered by an agreement for D maintenance of lifts in Pekeliling Flats made between the defendant and the third party for a period during which the accident took place. Under the agreement, the third party was paid RM180 per month for maintaining each of the lifts, and it emerged in evidence that in cases of major repairs or replacement of parts costing more than RM300 (as involved in the instant E case), the third party had to submit quotations to the Dewan Bandaraya and 'local orders' had to be given by the defendant before such work could be commenced.

The lifts, as far as all the parties herein were concerned were under the control and management of and to be maintained by the defendant at the cost of the defendant.

F Further the third party agreed to carry out its work 'according to a reasonable working capability ...' the wording is clumsy and not quite English, but the meaning is clear enough, ie reasonable skill. The third party further agreed to arrange for insurance for, among other things, damages 'under the common law ...' for accidents arising out of the work in connection with the agreement and if the third party failed to do so, such G damages, etc could be recovered from the third party itself by the defendant.

Further, cl 4 of the maintenance agreement, stated: 'whenever there is a lift breakdown and which the contractor is examining or maintaining or undertaking any other work, the contractor must display at every landing door of the lift, a notice or a cordon or a reasonable signboard indicating that the particular lift is out of order.'

H It was not disputed that an officer from Jabatan Kilang and Jentera, Kuala Lumpur had on 10 October 1979 written a warning letter to the defendant pointing out the defects of all the three lifts there, which were required to be rectified by replacements of defective parts with new parts, including all landing doors of all lifts all within six months, failing which the I defendant would not be allowed to operate the lifts anymore.

The 'local orders' for the defects were received quite late by the third party, but at any rate before the date of the accident on 29 April 1980 by then, also six months after the inspector of machinery's letter aforesaid.

The learned trial judge gave judgment for the plaintiff against the defendant but dismissed the claim for indemnity against the third party, holding, as his Lordship apparently agreed with counsel's submission, that the plaintiff was an invitee of the defendant and that the defendant owed a duty of care to him and briefly put, in regard to the third party, the defendant failed to give approval (ie the local orders aforesaid) promptly or early despite the letter from the inspector of machinery aforesaid, and it was only on 21 April 1980 that the 'local orders' or instructions to proceed reached the third party who should therefore not be blamed.

While we agreed with the judgment against the defendant in favour of the plaintiff, we were unable to agree with the judgment in favour of the third party against the defendant.

The instant case belongs to the realm of liability of occupier or owner for dangerous premises at common law. For better understanding the position, we use the expression, 'occupier' hereinafter.

It is important to point out immediately that the common law as regards the liability of occupier of dangerous premises (including land, buildings and structures) still applies wholly to Malaysia but much of it has been modified in Britain by Britain's Occupier's Liability Act 1957 which was intended to improve and modify the common law, eg and, inter alia, by abolishing the distinction between an invitee and a licensee. Cases decided in Britain under the Occupier's Liability Act 1957 therefore since its enforcement in Britain, would tend to be misleading in Malaysia and ought to be eschewed in favour of pre-1957 cases there for our use and reference.

In this judgment therefore, we would mainly rely on such pre-1957 cases unless when it is in order to resort to post-1957 cases when a particular part of the common law has remained intact and unscathed.

Speaking of plaintiffs entering premises, the liability of occupiers of such premises to take care exists but it depends on the character in which they have entered them. First, we have people who enter them by virtue of a contract, such as a guest in a hotel; secondly, we have people who enter them on business of interest, both to such persons as well as the occupiers, eg a customer going into a shop to view the goods, they are the invitees; thirdly, we have persons who enter them with the express or implied permission of the occupiers, without neither a contract, nor such community of interest, they are called licensees; and fourthly, there are persons who enter as trespassers. In the order we have mentioned such persons, the duty of care is cast in a descending scale, the highest duty of care being towards persons who enter the premises by virtue of a contract down and not so high in the case of invitees and so on. Such duty of care has been spelt out at common law in each case.

The plaintiff entered the lift not at all on business of common interest to the Datuk Bandar, viz the defendant and to himself, but definitely with implied permission from the defendant. It must be borne in mind that he was injured at the lift or rather in the shaft of the lift, the lift being under the occupation or possession legally of the defendant, maintained or controlled by the defendant for the benefit of the tenants of the flats there, who when using the lifts, were invitees of the defendant, the plaintiff was a licensee of the defendant, at the lift and its immediate vicinity. Thus a lodger staying

with a tenant was held to be an invitee of the tenant but a licensee of the landlord in *Fairman v Perpetual Investment Building Society.*[1]

What then is the standard of such duty of care owed to a licensee? A licensee must take the premises as he finds them, and the duty owed is not to expose him to hidden perils, and to warn him of existing traps or concealed danger, see *Fairman.*[1] A trap, as stated by Hamilton, LJ in *Latham v R Johnson & Nephew Ltd*[2] is something which sometimes involves 'the appearance of safety under circumstances cloaking a reality of danger'.

The lift door was partly open or ajar for about one foot. There was no warning of any kind about the danger as the lift was out of order, neither was there any barricade of any kind. There was even no light just outside the lift door, there was no lift inside and plaintiff could have also stepped into eternity also (pardon our metaphor), the features in the instant were classic of the appearance of safety under circumstances cloaking a reality of danger.

If the independent contractor, ie the third party in this case was not involved, then there could not be the slightest doubt that the Datuk Bandar, ie the defendant was liable. However it was repeatedly submitted that the defendant was not liable for default or negligence of his independent contractor whom the defendant chose and whose competence was not disputed by any party. Could therefore the blame for the plaintiff's misfortune be shifted on to the shoulders of the defendant's independent contractor in the circumstances of this case?

While the rule that an employer of an independent contractor is not liable for the default or negligence of such contractor no doubt exists, there are exceptions, and it is outside the province of this judgment to elaborate all the exceptions but only briefly to deal with them except those which are directly concerned with the instant case.

The first exception is where an employer has not exercised care in selecting a competent contractor as was much pressed in argument in the present case. The second exception is a group of cases or situations when the duty to take care is said to be 'non-delegable'. A non-delegable duty to take care means in effect that the employer would have to see to it that such duty of care is exercised, whether by his contractor or not, otherwise he would be equally liable as the contractor, in addition, in most cases, to the liability of his contractor. Such non-delegable duty exists in the case of work causing withdrawal of support to a neighbour's land, see *Bower v Peat;*[3] work done on a highway, see *Tarry v Ashton;*[4] cases of a master's duties for his servant's safety at common law, see *Wilsons & Clyde Coal Co Ltd v Flynn;*[5] cases of strict liability and finally cases of statutory duty imposed on certain categories of persons.

The last two mentioned exceptions require elaboration as they have considerable relevance to our instant case.

The exception in regard to cases of strict liability above-mentioned refers to cases of such strict liability at common law, such as the rule in *Rylands v Fletcher.*[6] The exception covers, inter alia, all cases involving extra hazardous acts or omissions, or situations created by them, which all involve special danger to others, please see the reference to them, eg in *Salsbury v Woodland & Ors,*[7] such as damage by fire, see *Honeywill & Stein Ltd v Larkin Brothers*

Ltd[8] so that an employer of an independent contractor, to repeat, cannot escape liability by delegating the work to such independent contractor. A

In our view, the situation described earlier as facing the plaintiff was a situation created by such an extra hazardous act or omission involving special danger to such users of that lift. The defendant could not escape such liability entrusted to or by entrusting to the third party. That is why we confirmed the judgment of the High Court against the defendant in favour of the plaintiff for this reason alone. B

The defendant would also be liable in any event, for a different reason, that the last mentioned exception about statutory duty applied to this case. The maintenance of the lift was also a statutory duty imposed on the defendant by the Factories and Machinery Act 1967. The defendant cannot also for the reason escape liability by delegating it to the third party, his independent contractor. Please see, eg ss 14, 15 and 21 of this Act. C

The breach of duty of not exposing the plaintiff to and of failure to warn the plaintiff of the concealed danger or trap in the instant case was specifically the failure by the third party and also by the defendant for not seeing to it that there was no such failure to give any warning signs in respect of the defective lift. D

Such failure aforesaid of the third party was in breach at least, of his contractual obligation to erect such warning signs, etc under cl 4 of the maintenance agreement of the lifts made between the defendant and the third party and a fortiori when in addition, the third party expressly agreed under cl 14 of the same to the effect to indemnify the defendant for damages for accidents at common law, the defendant was clearly entitled to indemnity from the third party in respect of the damages payable by the defendant to the plaintiff. The third party was also negligent, (quite apart from the breach of the said cl 4 of the said agreement) of such failure in giving such warning signs, before the date of the accident, from the moment (like the defendant), it came to know or ought to know of the trap or hidden danger created by the defective lift notwithstanding the demoralizing delay by the defendant in approving the purchase order for the spare parts; a fortiori when it had in fact already received such approval about eight days before the date of accident. E F G

We therefore made the order mentioned earlier accordingly.

Order accordingly.

Reported by Prof Ahmad Ibrahim

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